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conflict is substantial enough to question the validity of admission of other-sex-crimes evidence involving either the prosecuting witness or third persons.

CONCLUSION

In a criminal prosecution, a defendant with a criminal record is not afforded the same degree of impartiality as a defendant who has none. It is a rare case where the prosecution is unable to introduce criminal history evidence. In spite of this inequality, courts are prone to admit criminal history evidence on the theory that it serves some "additional purpose," be it to impeach credibility, rebut good character, or aid in proving guilt. But when criminal history evidence serves only to expose a defendant's propensity to commit crime, it is no longer a question of balancing "additional purpose" against possible prejudice. Rather, the question is whether the defendant will be found guilty, not on the whole of the evidence, but on the jury's overmastering hostility roused by evidence of his criminal character. The latter situation exists under the present liberal use of criminal history evidence in Ohio.

EDWARD F. MAREK

The Near-Absolute Rights of the Holder of an Ohio Motor Vehicle Certificate of Title

The Ohio Motor Vehicle Certificate of Title Act[1] has been widely recognized[2] as extreme — extreme in its protection of the local bona fide purchaser of a motor vehicle. As the Ohio act is applied today, the holder of a clear Ohio certificate of title has little to fear, for his ownership rights are nearly absolute.

The recent Ohio Supreme Court decision in *Commercial Credit Corp. v. Pottmeyer*,[3] again focuses attention on Ohio's strict position. As the result of this case, a thief who procures a clear Ohio certificate can pass good title to a bona fide purchaser. This holding motivates a review and analysis of Ohio's position and the effect of the certificate on ownership and security interests in Ohio motor vehicles.

1. OHIO REV. CODE §§ 4505.01-.99.

2. "The Ohio law . . . is an example of the most stringent certificate act . . . ." Note, 36 MINN. L. REV. 77, 80 (1951). "Ohio's Certificate of Title Act is an example of the most stringent type." Note, 5 W. RES. L. REV. 403, 404 (1954). "Ohio just about takes the cake." Oldfather, *The Tale of Title Certificates in Kansas*, 3 KAN. L. REV. 305, 317 (1955).

3. 176 Ohio St. 1, 197 N.E.2d 343 (1964).

BACKGROUND

A motor vehicle is a uniquely mobile chattel. Frequent changes in ownership over large areas subject motor vehicle transactions to special problems. Although a local county recording system may be adequate for protection of interests in relatively stationary chattels, it is manifestly incapable of protecting ownership and security interests in a chattel of constantly changing situs. The onerous task of searching for a lien in every county and large city in the state prohibits a thorough search.[4] Prompted by this need for special legislation in the area of motor vehicle transactions, forty-one legislatures have now enacted motor vehicle certificate of title acts.[5]

Certificate of title statutes typically provide that every motor vehicle owned locally be represented by a certificate of title.[6] The state normally maintains duplicate copies in a central filing system. Transfer of title is accomplished by an assignment of the certificate to the transferee. But many certificate of title acts require more than issuance of certificates and establishment of a central filing system. Often, security interests may only be perfected by notation on the certificate itself.[7] A certificate of title in these jurisdictions serves as a portable recording system.

The expressed purpose of certificate of title legislation is to protect ownership of vehicles against fraud and theft.[8] Ideally, a prospective purchaser should be able to ascertain the status of a vehicle's title by the simple inspection of one document. Practice, however, is far removed from the ideal. A major contributor is the lack of uniformity of the various state acts.

THE STATUTES

Legal literature is replete with articles dissecting, analyzing, classifying and comparing the various and varied title acts.[9] No attempt is made here to amplify or enlarge upon past studies. Appreciation of Ohio's posi-

4. Finance companies often do not consider it worthwhile to record their liens in states with no title act. Note, 36 MINN. L. REV. 77, 82 & n.42 (1951).

5. See notes 15 and 16 *infra.*

6. See, *e.g.,* OHIO REV. CODE § 4505.03; VA. CODE ANN. §§ 46.1-.16 (Supp. 1964).

7. See, *e.g.,* COLO. REV. STAT. ANN. §§ 13-6-7 to -22 (1953); FLA. STAT. ANN. § 319.27 (Supp. 1963); NEB. REV. STAT. § 60-110 (1960); OHIO REV. CODE § 4505.13 (Supp. 1963).

8. "The purpose of the act is . . . to make automobile titles more safe and certain, to protect those who deal therein, 'and to obviate the necessity of relying upon circumstantial evidence as to the ownership thereof.'" Jorgensen v. Morris, 122 Colo. 94, 98, 220 P.2d 348, 361 (1950). "[T]he purpose of the Ohio Certificate of Title Act is to protect owners of automobiles against fraud." Associates Discount Corp. v. Colonial Fin. Co., 88 Ohio App. 205, 210, 98 N.E.2d 848, 851 (1950).

9. *E.g.,* Townsend, *The Case of the Mysterious Accessory,* 16 LAW & CONTEMP. PROB. 197 (1951); Comment, *The California Used Car Dealer and the Foreign Lien — A Study in the Conflict of Laws,* 47 CALIF. L. REV. 543 (1959); Note, *The Effect of Motor Vehicle Registration Statutes on Security Transactions and Recordations,* 1951 WASH. U.L.Q. 539.

tion can only be gained, however, by viewing its statute in the context of other such acts. A short exposition and overview is therefore necessary.

Non-Title States

Ten states[10] do not have certificate of title legislation. Instead, registration laws[11] provide for the registration of all vehicles for revenue production and law enforcement purposes. The issued registration certificate or receipt, although not intended to control title, serves some of the purposes of a certificate of title.[12] But holders of security interests in motor vehicles must seek protection from local recording systems[13] created under chattel mortgage acts, conditional sales acts, or the Uniform Commercial Code.[14]

Title States

The forty-one title-act jurisdictions have been conveniently classified according to the degree which their legislatures have undertaken to vest the certificate of title with conclusiveness of ownership. A minority of states[15] provide for notation of security interests on the certificate *only* upon transfer of the vehicle. These title acts are referred to as "incomplete." Encumbrances created between conveyances can only be protected by local recording. Consequently, the title certificate utilized by "incomplete" title acts is of little more value than a registration receipt.

A majority of title-act jurisdictions[16] provide that *all* liens and encumbrances on motor vehicles be noted on the certificate of title.[17] However, some contain no express provision concerning the effect of the notation

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10. Alabama, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, New York, Rhode Island, Virginia. See Comment, 47 CALIF. L. REV. 543, 574-75 (1959).

11. See, *e.g.*, KY. REV. STAT. §§ 186.005-.285 (1963).

12. See Townsend, *The Case of the Mysterious Accessory*, 16 LAW & CONTEMP. PROB. 197, 198-99 (1951).

13. *But cf.* GA. ACTS 1925, at 315 (liens noted on application for registration certificate).

14. UNIFORM COMMERCIAL CODE § 9-401 provides a filing system for perfecting security interests in all chattels.

15. Illinois, Indiana, Maryland, North Carolina, North Dakota, Oklahoma, South Dakota, West Virginia, Wisconsin. See Comment, 47 CALIF. L. REV. 543, 576-86 (1959).

16. See Comment, *supra* note 15. Since the *California Law Review* compilation, the following have enacted a title act: CONN. GEN. STAT. ANN. §§ 14-165 to -195 (1960); GA. CODE ANN. §§ 68-401a to -443a.

17. A number of acts do not expressly designate the statutory procedure as exclusive. Judicial decision has rectified the situation in most jurisdictions by declaring the ordinary chattel mortgage recording procedure superseded by the title act. In Motor Inv. Co. v. Knox City, 174 S.W.2d 482 (Tex. 1943), the mortgagee filed his mortgage in full compliance with the chattel mortgage act but failed to have the lien noted on the certificate of title. Held: there was no constructive notice to a subsequent purchaser.

on third party claims.[18] Also, the effect of this type of statute depends heavily on judicial interpretation.

A stricter variety of title statutes demands notation of all security interests as a prerequisite to constructive notice.[19] The Ohio statute falls within this category.

The Ohio Statute

The Ohio Motor Vehicle Certificate of Title Act became effective January 1, 1938. Its constitutionality was upheld that same year.[20] The sweeping language of section 4505.04 of the Ohio Revised Code, necessary to any discussion of the Ohio Law, reads in part:

> No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle sold or disposed of, or mortgaged or encumbered, unless evidenced: (a) By a certificate of title or a manufacturer's or importer's certificate. . . .[21]

Obviously, a literal construction of this language can have a significant impact on established rules of law. However, such a strict an interpretation has never been applied consistently in all cases involving the Ohio motor vehicle law. The areas of fraud[22] and theft[23] adequately demonstrate the past inconsistencies in the courts' application of the statute.

FRAUD IN THE CHAIN OF TITLE

Opportunities for forgery and fraud are present in any situation in which the law clothes a document with great value. In the case of title certificates, the defrauder can obtain a clear certificate by various means. The "duplicates racket" is an example. The owner of a motor vehicle may procure a duplicate certificate by claiming loss or destruction of the original. The "racket" consists of encumbering the vehicle with the duplicate, and subsequently conveying the vehicle by assignment of the clear original certificate.[24]

Another means of securing a certificate involves interstate movement. Suppose that an encumbered vehicle is transported to another state and falsely represented as unencumbered. In non-title states it is not difficult

18. Kansas, Michigan, New Jersey, Oregon, South Carolina, Washington, Wyoming.

19. See, *e.g.*, FLA. STAT. ANN. § 319.27(2) (1957); MO. REV. STAT. § 301.210 (1959) (lien is notice "to whole world"); OHIO REV. CODE § 4505.04.

20. State *ex rel.* City Loan & Sav. Co. v. Taggart, 134 Ohio St. 374, 17 N.E.2d 758 (1938).

21. OHIO REV. CODE § 4505.04.

22. Kelley Kar Co. v. Finkler, 155 Ohio St. 547, 99 N.E.2d 665 (1951).

23. Atlantic Fin. Co. v. Fisher, 173 Ohio St. 387, 183 N.E.2d 135 (1962).

24. For a recent illustration of shady dealing including the "duplicates racket" see City Loan & Sav. Co. v. Ludwig, 197 N.E.2d 815 (Ohio Ct. App. 1963).

to obtain a registration certificate. In fact, in several of these states a certificate may be obtained without producing evidence of ownership.[25] Subsequent presentation of the registration certificate in a title state results in the issuance of a title certificate.

Typically, a replevin action is brought by a foreign lienor against a local purchaser who relied on the clear certificate of title. The great majority of courts rely upon whether the foreign lienor consented to the removal of the vehicle from the lien-creating state.[26] If the foreign lienor has knowledge of the removal, or has not taken all precautions to protect his interests, the majority of states allows the local purchaser to prevail, usually on the ground that he is the more innocent of two innocent parties.[27]

However, where the foreign lienor has taken all protective measures, and has no notice of the removal until after the subsequent conveyance, a "harder" case is presented. Equally innocent parties are now before the court. The policy of encouraging credit operations works in favor of the lien holder. On the other hand, holding for the innocent purchaser enhances the value of the certificate as a notice-giving instrument, and thus encourages the free alienability of motor vehicles. The great weight of American authority[28] allows the foreign lienor to prevail, usually on principles of comity.[29]

Ohio Decisions

An Ohio appeals court[30] bravely followed the majority American view in spite of the literal words of the Ohio statute. In holding for the foreign lienor, the court declared a fraudulently procured Ohio certificate of title void *ab initio*. A contrary decision, declared the court, would have the effect of overriding the very purpose of the statute, that is, the protection of ownership of motor vehicles from fraud.[31] Several other appellate courts, however, read the statute literally and held for the local purchaser.[32]

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25. Comment, 47 CALIF. L. REV. 543, 548 & n.45 (1959).

26. This conforms to the Restatement rule. RESTATEMENT, CONFLICT OF LAWS §§ 265-78 (1934).

27. Nichols v. Bogda Motors, Inc., 118 Ind. App. 156, 77 N.E.2d 905 (1948).

28. First Nat'l Bank v. Swegler, 336 Ill. App. 197, 82 N.E.2d 920 (1948) (chattel mortgage); Eline v. Commercial Credit Corp., 307 Ky. 77, 209 S.W.2d 846 (1948) (conditional sales contract); Annot., 13 A.L.R.2d 1312, 1326-29 (1950).

29. Atha v. Bockius, 39 Cal. 2d 635, 248 P.2d 745 (1952); Livingston v. National Shawmut Bank, 62 So. 2d 13 (Fla. 1952); Bank of Atlanta v. Fretz, 148 Tex. 551, 226 S.W.2d 843 (1950).

30. Associates Discount Corp. v. Colonial Fin. Co., 88 Ohio App. 205, 98 N.E.2d 848 (1950).

31. *Id.* at 210, 98 N.E.2d at 851.

32. White-Allen Chevrolet Co. v. Licher, 81 N.E.2d 232 (Ohio Ct. App. 1948); Schiefer v. Schnaufer, 71 Ohio App. 431, 50 N.E.2d 365 (1943); Union Commercial Corp. v. Schmunk, 30 Ohio L. Abs. 116 (Ct. App. 1939).

The conflict was resolved in 1951 in the much discussed,[33] landmark decision of *Kelley Kar Co. v. Finkler*.[34] There, a California vendee transported an encumbered automobile to Vermont, a non-title state, and fraudulently obtained a registration certificate indicating unencumbered ownership. On the strength of the Vermont certificate, the vendee received a clean Ohio certificate and then conveyed the automobile to an innocent Ohio purchaser. The supreme court held that the California vendor could not succeed in a replevin action against a subsequent, good faith Ohio purchaser possessing a clean Ohio certificate of title. Plaintiff's comity argument was rejected on the ground that the statute clearly stated the public policy of the state.[35] No right, title, claim, or interest would be recognized by the court unless accompanied by an Ohio certificate of title.

The broad holding in *Kelley Kar* has been approved by some, criticized by others,[36] but generally followed by the appellate courts.[37] At least one appellate court,[38] however, in considering a conversion action, showed dissatisfaction with the *Kelley Kar* decision:

> It seems strange that by the law of the [*Kelley Kar*] . . . case a certificate of title induced by fraud and perjury is given absolute verity and permitted to destroy the lien of a valid mortgage made in a sister state. . . .[39]

The court then confined the *Kelley Kar* holding to instances where the contract of sale to the local purchaser was made in Ohio. This position has been criticized.[40]

In the most recent appellate decision,[41] a Kentucky mortgagor obtained a clear Ohio certificate by presenting a Kentucky registration and a false application.[42] Controlled by the *Kelley Kar* decision, the case presents no new law. The facts, however, illustrate the ease with

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33. Note, 5 W. RES. L. REV. 403, 406 (1954); Note, 6 ARK. L. REV. 223 (1951); Note, 27 NOTRE DAME LAW. 139 (1951); Note, 13 OHIO ST. L.J. 296 (1952).

34. 155 Ohio St. 541, 99 N.E.2d 665 (1951).

35. *Id.* at 548, 99 N.E.2d at 669.

36. Note, 5 W. RES. L. REV. 403, 408 (1954); Note, 16 OHIO ST. L.J. 625, 628-29 (1956).

37. Fayette Inv. Corp. v. Jack Johnson Chevrolet Co., 119 Ohio App. 111, 197 N.E.2d 373 (1963). Commercial Credit Corp. v. Reising, 96 Ohio App. 445, 122 N.E.2d 301 (1953), *appeal dismissed*, 161 Ohio St. 570, 120 N.E.2d 307 (1954); Royal Ind. Bank v. Klein, 92 Ohio App. 309, 110 N.E.2d 40 (1952); Graves & Sons, Inc. v. Cooper & Son Motor Sales, Inc., 119 N.E.2d 447 (Ohio Ct. App. 1951).

38. Associates Discount Corp. v. Main Street Motors, Inc., 113 N.E.2d 734 (Ohio Ct. App.), *appeal dismissed*, 157 Ohio St. 488, 105 N.E.2d 878 (1952).

39. *Id.* at 738.

40. Note, 5 W. RES. L. REV. 403, 407 (1954).

41. Fayette Inv. Corp. v. Jack Johnson Chevrolet Co., 119 Ohio App. 111, 197 N.E.2d 373 (1963).

42. See OHIO REV. CODE § 4505.02 for a statement of the clerk's duties.

which a party from a bordering non-title state, such as Kentucky, can obtain a clean Ohio certificate and thus defeat a foreign security interest.

THEFT IN THE CHAIN OF TITLE

It is a general rule of American law that one cannot convey better title to personal property than he has.[43] However, exceptions and qualifications have been engrafted on the general rule due to its harsh effect on innocent purchasers. For example, principles of estoppel may preclude an original owner from recovery.[44] Money and negotiable paper transferable by delivery are well established exceptions.[45] Further, in some cases a bona fide purchaser of warehouse receipts or bills of lading is protected.[46] But motor vehicle transactions, whether the vehicle is accompanied by a certificate of title or not, have never been considered an exception to the general rule that a thief cannot pass title.

In the typical case involving theft, the foreign plaintiff brings a replevin action against the local purchaser. With the exception of possible estoppel,[47] no issue is presented in the non-title state.[48] Under common law plaintiff prevails. In title-act states, however, the defendant bona fide purchaser may contend that the act modifies the common law.

In a replevin action in Nebraska, a title-act state, defendant argued that his Nebraska certificate of title was conclusive of his ownership and right to possession.[49] The argument was premised on a provision[50] in the Nebraska statute which exactly duplicates the "no court . . . shall recognize the right, title, claim or interest . . . ." language in section 4505.04 of the Ohio Revised Code. The court held for the plaintiff, apparently on the ground that the legislature "under the guise of a police regulation" cannot validly invade the field of contract and property rights.[51]

A Texas court,[52] faced with a similar fact situation, found for the plaintiff by applying two sections of the Texas act. One section makes

43. Murray v. Lardner, 69 U.S. 110, 118 (1864); 46 AM. JUR. *Sales* § 458 (1943).

44. *Cf.* UNIFORM COMMERCIAL CODE § 2-403; OHIO REV. CODE § 1302.44.

45. UNIFORM COMMERCIAL CODE §§ 3-201, -202; UNIFORM NEGOTIABLE INSTRUMENTS LAW § 1-10.

46. UNIFORM COMMERCIAL CODE § 7-502; OHIO REV. CODE § 1307.30.

47. See Avis Rent-A-Car Sys., Inc., v. Harrison Motor Co., 151 So. 2d 855 (Fla. Ct. App. 1963), wherein a bona fide purchaser failed to prevail on the estoppel defense.

48. Stathem v. Ferrell, 267 Ala. 333, 101 So. 2d 546 (1958) (dictum); Gay v. Huguley, 33 Ala. App. 483, 34 So. 2d 712 (1948); McElroy v. Williams Bros. Motors, Inc., 104 Ga. App. 435, 121 S.E.2d 917 (1961); Gurley v. Phoenix Ins. Co., 233 Miss. 58, 101 So. 2d 101 (1958).

49. Snyder v. Lincoln, 150 Neb. 581, 588-89, 35 N.W.2d 483, 488 (1948).

50. NEB. REV. STAT. § 60-105 (Supp. 1957).

51. Snyder v. Lincoln, 150 Neb. 581, 590, 35 N.W.2d 483, 488 (1948).

52. Beauchamp v. Nichols, 278 S.W.2d 535 (Tex. Civ. App. 1954).

it unlawful to apply for a certificate on a stolen vehicle. The other provides that all sales in violation of the act are void. Result: the bona fide purchaser never received title.[53]

Ohio Decisions

Prior to 1964, the Ohio courts[54] had unanimously regarded the case involving theft as a clear exception to the "plain meaning" construction of section 4505.04 of the Ohio Revised Code as applied in other cases. The leading appellate decision, *Mock v. Kaffits*,[55] held that the provisions of the act did not prevent application of the rule that stolen property may be recovered from an innocent purchaser.[56]

The same issue reached the Ohio Supreme Court in 1962 in the case of *Atlantic Finance Co. v. Fisher*.[57] There a thief, having stolen an automobile in Illinois, procured a clear Ohio certificate of title and conveyed the auto to defendant. Plaintiff, a foreign lienor in possession of an Illinois certificate of title, brought a replevin action. According to the majority:

> [T]he public policy of Ohio of protecting innocent Ohio purchasers as expressed in the case of *Kelley Kar Co. v. Finkler* . . . should weigh no more heavily in the scales than the protection of innocent citizens of our sister states from theft.[58]

The court tipped those scales in favor of the out-of-state interest on the ground that full faith and credit must be given an Illinois certificate of title.

The holding in the *Atlantic Finance* case remained the law in Ohio for two years. In *Commercial Credit Corp. v. Pottmeyer*,[59] the supreme court expressly overruled *Atlantic Finance*.[60] The majority found that the clear words of the act, as previously construed in *Kelley Kar*, required judgment for the bona fide purchaser. As an added argument, the court pointed to the legislative action taken in the session following the *Kelley*

53. *Id.* at 538.

54. Atlantic Fin. Co. v. Fisher, 173 Ohio St. 387, 183 N.E.2d 135 (1962); Ohio Cas. Ins. Co. v. Guterman, 97 Ohio App. 237, 125 N.E.2d 350 (1954); Mock v. Kaffits, 75 Ohio App. 305, 62 N.E.2d 172 (1944).

55. 75 Ohio App. 305, 62 N.E.2d 172 (1944).

56. In a subsequent appellate decision the *Kelley Kar* holding was distinguished. Ohio Cas. Ins. Co. v. Guterman, 97 Ohio App. 237, 125 N.E.2d 350 (1954).

57. 173 Ohio St. 387, 183 N.E.2d 135 (1962).

58. *Id.* at 390, 183 N.E.2d at 137.

59. 176 Ohio St. 1, 197 N.E.2d 343 (1964).

60. Although the opinion does not make it clear, no outright theft was involved. The West Virginia dealer voluntarily relinquished possession of the vehicle to the buyer after execution of a conditional sales contract. A cohort of the buyer then transported the automobile to Ohio and placed it on the auction block.

The facts of the case did not demand the overruling of *Atlantic Finance;* they appear to be controlled by *Kelley Kar.*

Kar decision. Section 4505.04 was amended in that session to include an additional means of evidencing a "right, title, claim or interest" in a motor vehicle, namely, "by admission in the pleadings or stipulation of the parties."[61] By making this change and no other, the majority reasoned that the legislature had affirmatively approved the *Kelley Kar* holding. For the court to now hold otherwise "would obviously amount to a usurpation of legislative power. . . ."[62]

The *Pottmeyer* minority conceded that section 4505.04, standing alone, appears to make the Ohio certificate conclusive as to title and security interests. But the dissent contended that section 4504.04 must be read in context; other sections indicate that the innocent holder of a certificate is not protected in all cases. For instance, the Registrar of Motor Vehicles is given the power to cancel certificates issued on stolen vehicles.[63]

Moreover, the minority argued that the legislative purpose of the act, as stated in its title, is "to prevent the importation of stolen motor vehicles and thefts and frauds in the transfer of title to motor vehicles . . . ."[64] this purpose is thwarted by allowing a thief to pass title.

It is significant that the minority opinion in the *Pottmeyer* decision makes no reference to the action of the legislature. The attempted "reading into the statute" of a legislative intent contrary to the majority holding appears quite weak in light of the amendment enacted *after* the *Kelley Kar* decision.

Although not mentioned by the minority, one might argue that the *Kelley Kar* holding applies only to cases of fraud, and not to situations involving theft. But as noted by Chief Justice Taft speaking for the majority:

> [T]here is nothing in the certificate of Title Act to justify the conclusion that the General Assembly intended to protect a bona fide purchaser of an automobile where his Ohio certificate resulted from the fraudulent representations of a swindler, but not where that certificate resulted from such representations by a thief.[65]

This reasoning is valid. Conceding the legislative stamp of approval on *Kelley Kar*, consistency and congruity in the application of the law can only lead to the conclusion that a thief can pass good title to a motor vehicle in Ohio.

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61. OHIO REV. CODE § 4505.04 (B).
62. Commercial Credit Corp. v. Pottmeyer, 176 Ohio St. 1, 5, 197 N.E.2d 343, 346 (1964).
63. OHIO REV. CODE §§ 4505.02-.13.
64. 117 Ohio Laws 373 (1937).
65. Commercial Credit Corp. v. Pottmeyer, 176 Ohio State 1, 9, 197 N.E.2d 343, 349 (1964).

REMAINING INCONSISTENCIES IN APPLICATION OF THE OHIO ACT

Riley v. Motorists Mut. Ins. Co.

The strong and clear language of the *Pottmeyer* decision might easily lead one to expect uniformity in future interpretations and applications of the Ohio act. But a case decided the same day as *Pottmeyer*, frustrates these expectations.

In *Riley v. Motorists Mut. Ins. Co.*,[66] the court was faced with the interpretation of the term "theft" as employed in an insurance policy. A Texas chattel mortgagee, having been victimized by his mortgagor, repossessed the encumbered automobile from a Zanesville, Ohio street. The Ohio bona fide purchaser, holder of an Ohio certificate of title, demanded payment from his insurer. The present action resulted from the insurer's refusal.

Noting that one is not chargeable with theft if he takes another's property with the belief that it is his own, a majority of the court, consisting of the three *Pottmeyer* dissenters plus Judge O'Neil, held for the defendant-insurer. According to the court, repossession of an automobile by a party claiming under a valid and recorded foreign lien is not a "theft" as that term is used in an insurance contract.

The inconsistency of this decision with the prior interpretations of the Ohio Motor Vehicle Act is plain. The Ohio certificate holder's title and interest may not be defeated in an Ohio court. Yet that same title and interest is subject to defeasance on the street. In effect, the court has instructed and encouraged foreign interests to resort to self-help.

In an able dissent, Judge Gibson summarizes the effect of the majority decision:

> To hold that there was no theft where the . . . [foreign lienor] through self-help repossessed the automobile in Ohio under a subsisting and recorded Texas mortgage lien thereon is (1) to recognize the claim or interest of a person in or to a motor vehicle who does not hold an Ohio certificate of title, and (2) to construe the insurance contract liberally in favor of the insurer, all contrary to well established Ohio law.[67]

Floor-Plan Estoppel Exception

There still remains at least one area in which the Ohio title act has not been given a literal interpretation. This is the area of wholesale financing plans and the floor-plan estoppel doctrine.

In purchasing automobiles from manufacturers, dealers often finance the purchase through finance companies. The debt is secured by a chat-

66. 176 Ohio St. 16, 197 N.E.2d 343 (1964).

67. Riley v. Motorists Mut. Ins. Co., 176 Ohio St. 16, 22, 197 N.E.2d 362, 367 (1964).

tel mortgage on the automobile.[68] In *Mutual Fin. Co. v. Municipal Employees Union Local No. 1099*,[69] the dealer sold the mortgaged automobiles to parties who had no notice of the prior liens. Upon default of payment by the dealer, the finance company brought a replevin action against the purchasers.

Under the clear language of the title law, estoppel cannot operate in favor of a bona fide purchaser against a party holding a manufacturer's certificate of title.[70] Nevertheless, the appellate court nullified the lien on equitable grounds.[71] As between two innocent parties, the first to trust the wrongdoer and provide the means for committing fraud must bear the loss.

Similarly, in *Mutual Fin. Co. v. Kozoil*,[72] the same appellate court again avoided the title act, this time on an agency theory.[73] When a dealer sells vehicles subject to a floor-plan mortgage, he is in effect acting as an agent for the finance company. Consequently, in *Kozoil* the finance company was directed to present a certificate of title to the innocent purchaser. The Ohio Supreme Court sustained the decision in a per curiam opinion.[74]

It is significant that the majority in *Pottmeyer* cited the *Kozoil* decision with approval. The strong language of *Pottmeyer* might otherwise have cast some doubt on the future validity of floor-plan cases. The court cited *Kozoil* as illustrative of the protection available to the bona fide purchaser, even without a certificate of title.

CONCLUSION

Concededly, stringent protection of the local purchaser is parochial in character. But a mere label does not aid analysis. More importantly, a strict and unbending rule necessarily results in unfairness in some cases. For instance, in a contest between a local *commercial* buyer who does not bother to check his seller's title, and an out-of-state party who has taken all possible protective precautions, should not, on principles of fairness,

68. 9 OHIO JUR. 2d *Chattel Mortgages* § 112 (1954).

69. 110 Ohio App. 341, 165 N.E.2d 435 (1960).

70. The applicable section reads in part: "Any mortgage . . . covering a motor vehicle, if such instrument is accompanied by delivery of a manufacturer's . . . certificate and followed by actual and continued possession of such certificate by the holder of said instrument . . . shall be valid . . . against subsequent purchasers . . . ." OHIO REV. CODE § 4505.13.

71. Mutual Fin. Co. v. Municipal Employees Union Local No. 1099, 110 Ohio App. 341, 350, 165 N.E.2d 435, 441 (1960).

72. Mutual Fin. Co. v. Kozoil, 111 Ohio App. 501, 165 N.E.2d 444 (1960); 22 OHIO ST. L.J. 746 (1961).

73. The agency theory had been pressed by defendant in the first *Mutual Finance* case, but was rejected by the court. Mutual Fin. Co. v. Municipal Employees Union Local No. 1099, 110 Ohio App. 341, 353, 165 N.E.2d 435, 443 (1960).

74. Mutual Fin. Co. v. Kozoil, 172 Ohio St. 265, 175 N.E.2d 88 (1961).

the out-of-state interest prevail? Also, in the case of outright theft, is it not difficult to reconcile the loss suffered by the foreign owner?

In the case of a *noncommercial* local purchaser, however, it is difficult to find unfairness in Ohio's position. Although a local purchaser realizes the risk of mechanical defects in purchasing a used car, he does not apprehend loss of his title. On the other hand, the foreign creditor is in the business of assuming risks. If his debtor is shiftless, he ought to bear the loss.

The result of a strict act, strictly applied, is a title certificate of enhanced value. Reliance may be placed on the certificate itself. Consequently, the alienability of motor vehicles is encouraged. In effect, Ohio has decided this policy overbalances the harshness that may result in the individual case. Furthermore, it is the non-uniformity of state law which is at the root of a majority of the interstate problems, not the Ohio act.

At least one constructive suggestion deserves attention. Having given motor vehicle certificates of title such high value, Ohio should strengthen its issuance procedure. Specifically, upon receipt of an application for a certificate for an out-of-state vehicle, the clerk should be required to obtain from the officials of the foreign state a statement of the title status.[75]

The present Ohio law requires only that such an applicant "present a certificate of title, bill of sale, or other evidence of ownership required by the law of another state from which such motor vehicle was brought. . . ."[76] Prior to the issuance of the certificate, the clerk of courts is required to exercise reasonable diligence in ascertaining whether or not the facts of the application are true.[77]

It is submitted that more stringent requirements in the case of an application for an out-of-state vehicle would decrease the number of successful frauds. Local interests would not be harmed, except for a short delay in some cases, and foreign interests would receive greater protection.

Of course, a more rigid administrative procedure is only a partial solution. But in view of Ohio's strict protection of its own citizens, it is only just that steps be taken to assure other citizens some measure of protection.

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75. For a proposed statute incorporating this provision see Leary, *Horse and Buggy Lien Law and Migratory Automobiles*, 96 U. PA. L. REV. 455, 481 (1948).

76. OHIO REV. CODE § 4505.06.

77. *Ibid.*